STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Murphy, PJ, O'Connell and Gage, JJ

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

No. 127651

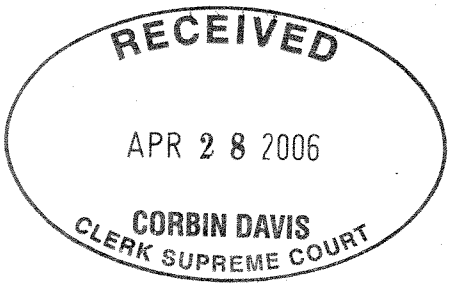
vs.

MICHAEL SCOTT APGAR
Defendant-Appellee.

COA No. 247544
Lower Court No.02-12129

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED



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I.

The subset of the elements test supplies the rule for determining when an offense is a degree of the charged offense "inferior to that charged" *where the legislature has not itself formally divided the offense into degrees.* The crime of criminal sexual conduct has been formally divided into degrees by the legislature. Is criminal sexual conduct in the third degree a degree of that offense inferior to criminal sexual conduct in the first degree, with application of the subset test unnecessary?

The People answer: YES
The Defendant answers: NO
The Court of Appeals answered: No

Statement of Facts

The Court of Appeals summarized the facts of the case as follows:

The victim in this case is a thirteen-year-old girl. Defendant lived with the family of the victim's friend in Dearborn. At her friend's house, the victim willingly got into a car alone with defendant and his two friends because they invited her to go to "the store" with them. The victim testified that they drove around for several hours while she was forced to smoke marijuana because a sharp knife-like object was pressed against her neck. They arrived at a home in Hamtramck. The victim did not attempt to escape because she did not know her whereabouts.

Defendant took the victim into an empty bedroom where they engaged in sexual intercourse. The victim testified that defendant had placed the knife-like object to her throat and threatened to kill her if she did not do as he said. In addition, the victim claimed that both of defendant's friends forced her to perform oral sex by threatening her with the same knife-life object. The victim also alleged that one of defendant's friends burned a homemade tattoo onto her chest before forcing her to perform oral sex. The victim was dropped off at or near her home after midnight, and she told her grandmother that she had been raped.

At the hospital, the victim underwent an examination, and a rape test was administered. The victim sustained a small bruise to her right buttock and irritation and redness to her vaginal opening, which was consistent with forcible sexual assault. The victim's vaginal area tested positive for semen, and a DNA test revealed that it matched defendant's types. From the carpet in the bedroom of the Hamtramck house, the police recovered three semen stains that matched the DNA types of defendant and his two friends.

Defendant was originally charged with one count of first-degree CSC (CSC I), MCL 750.520b(1)(e) (person armed with a weapon or an object that the victim believes is a weapon), and one count of CSC I, MCL 750.520b(1)(d) (person is aided or abetted by one or more other persons and uses force or coercion to accomplish the sexual penetration). After the jury was selected, the prosecutor orally moved to amend the felony information to include a charge of CSC III, MCL 750.520d(1)(a) (person at least thirteen years of age and under sixteen years of age). The prosecutor argued that it was necessary to amend the felony information under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), because CSC III under MCL 750.520d(1)(a) is not a necessarily lesser included offense of CSC I under either MCL 750.520b(1)(d) or (1)(e).

The trial court denied the prosecutor's request to amend the information as follows:

THE COURT: . . . I am not amending any information two minutes before we swear the jury in. So, I mean, that's the ruling. It's latches, or whatever you want to call it, you guys [the prosecution] had a full opportunity, not you, but anybody in your office had an opportunity to do this at an earlier time. The defense is here, ready to go to trial.

Your motion to amend the information is denied.

Okay?

PROSECUTOR: But the Court is willing to give the lesser. There's no –

THE COURT: Well, the lesser is something different, you know. But I'm not amending anything.

Over defense counsel's objection, the trial court subsequently provided a jury instruction on CSC III, and the jury convicted defendant on that charge.[1]

The People would add that when the prosecutor indicated before testimony that he would be "asking for a lesser included of criminal sexual conduct in the third degree under count two for each defendant, if I can say it that way, as to her age," in addition to asking for criminal sexual conduct in the third degree as an included offense simply on the basis of the absence of charged aggravating circumstances (the weapon, and aiding and abetted by others), [2] the trial judge agreed that the latter charge of criminal sexual conduct in the third degree was appropriate, and as to the former said to counsel "you're aware of that" to which counsel answered not only "we are," but "*no objection.*"[3] The prosecutor asked as a "technical" matter to amend the information to add a count on the theory

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[1] A.

[2] I, 182.

[3] I, 184 (emphasis supplied).

based on age.[4] Defense counsel made no objection, but the trial judge ruled "I am not amending any information...the lessers is something different, you know. But I'm not amending anything."[5] The case proceeded, then, on the prosecutor's understanding that the theory would be instructed on as an included offense (without objection), but the information would not be amended.

When instructions were discussed near the conclusion of trial, however, defense counsel changed course, now objecting to a criminal sexual conduct in the third degree charge on the theory of age.[6] The trial judge gave the instruction. During opening statement and closing argument defense counsel essentially argued that the jury should convict defendant of this offense rather than criminal sexual conduct in the first degree.[7] And the jury convicted defendant of criminal sexual conduct in the third degree.

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[4] 23A.

[5] 24-25A.

[6] 32-35A. This appears to have been a summary for the record of matters taken up in chambers, as the trial judge did not further rule, apparently having indicated in chambers that the instruction would be given nonetheless. For reasons not apparent on the record, only this theory of criminal sexual conduct in the third degree was given to the jury.

[7] Counsel's argument from the beginning was the consensual sex had occurred, but there was no weapon nor any "aided" by another involved. See e.g. in opening statement, "They went into a back room and the individuals had sex, consensual sex. No knife. No coercion. No force." (28A); "I would be completely off base if I said that there wasn't sex" (31A); and from the closing argument, "No knife was recovered because there was no knife there" (36A); "Had sex? Of course she had sex....Mr. Apgar admits that to the police. Did he say he put a knife to somebody, forced somebody to do something? No.. There's a difference between criminal sexual conduct first degree, using a knife and force, and statutory rape. Big difference" (40A); "Erin, by law, cannot consent to sex. By law. She's thirteen. We know that" (43A); and at sentencing the defendant himself said "I know what I did was wrong. I'd like to apologize to the family, and to the victim." (44A).

The Court of Appeals affirmed, but found that criminal sexual conduct in the third degree as charged here (turning on the age of the victim) is not included in criminal sexual conduct in the first degree under *People v Cornell* because the lesser contains an element not contained in the greater. The majority found, however, that under previous law criminal sexual conduct in the third degree was a cognate offense, and that "[a]lthough defendant was convicted of an uncharged crime, we conclude that defendant was not deprived of due process because all of the elements of the uncharged crime were proved at the preliminary examination and trial without objection, providing defendant adequate notice. *Cornell*, *supra* at 353-355; *Bearss*, *supra* at 628-629; *People v Hunt,* 442 Mich 359, 362; 501 NW2d 151 (1993)." The concurring judge took the view that "that the plain, unambiguous language of the Michigan statute should control"; that is, that by the very terms of the criminal sexual conduct statutes a third-degree offense is inferior to a first-degree offense, and thus a permissible instruction under MCL 768.32. One judge dissented on the fair notice issue. This court granted the People's application for leave to appeal.[8]

[8] Though the conviction was affirmed, the People sought leave on the important legal question, decided adversely, as to whether the *Cornell* test applies to offenses that the legislature has *formally* divided into degrees, the People being apprehensive that no application on behalf of the defendant was going to be filed in this case (which turned out to be the case). This court has directed that the parties brief whether the application is appropriate given MCR 7.203(A).

Argument

I.

The subset of the elements test supplies the rule for determining when an offense is a degree of the charged offense "inferior to that charged" *where the legislature has not itself formally divided the offense into degrees.* The crime of criminal sexual conduct has been formally divided into degrees by the legislature. Criminal sexual conduct in the third degree is a degree of that offense inferior to criminal sexual conduct in the first degree, with application of the subset test unnecessary.

A. MCR 7.203(A) Does Not Bar A Party Who "Prevailed" From Gaining Review of the Decision of the Court of Appeals in This Court

In granting the People's application, the court directed that the parties address whether the "prosecution is an 'aggrieved party' within the meaning of MCR 7.203(A), in light of the fact that the Court of Appeals affirmed defendant's conviction."[9] The People believe that there is a short answer to the question—MCR 7.203(A) does not govern the circumstances under which a party may seek leave to appeal from this court, nor control this court's authority to grant leave to appeal.

MCR 7.203(A) concerns the jurisdiction of the *Court of Appeals*. Subchapter 7.200 of the Michigan Court Rules is entirely concerned with the Court of Appeals—its title is "Subchapter 7.200 Court of Appeals." Const. 1963, Art. 6, § 10 provides that "[t]he jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." MCR 7.203(A) thus represents an exercise of this court's practice and procedure authority in implementing the jurisdiction of the Court of Appeals in appeals by right as provided in MCL § 600.308. The court rule provides that the Court of Appeals "has jurisdiction of an appeal

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[9] Order of 3-31-2006, granting leave to appeal.

of right *filed by an aggrieved party* from the following," then listing the circumstances where, by law, the Court of Appeals may entertain an appeal by right. This provision has nothing to do with applications for leave to appeal to this court from decisions of the Court of Appeals.

Unlike the Court of Appeals, the appellate jurisdiction of this court is *not* set by the legislature, but is determined, under our constitution, by the court itself. Const. 1963, Art. 6 § 4 provides that "[t]he supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and *appellate jurisdiction as provided by rules of the supreme court*" (emphasis supplied). The question becomes, then, what do the rules of *this* court provide concerning this court's jurisdiction? Subchapter 7.300 contains the rules concerning this court, and has no counterpart to Rule 7.203(A). Rule 7.301(A) contains this court's implementation of Const. 1963, Art. 6 § 4, and sets forth the jurisdiction of the court. It says only, in pertinent part, that the "Supreme Court may: (2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals." Rule 7.302 concerns the grounds a party must set out in order to persuade this court to invoke its jurisdiction, and none of them refers in any way to a requirement that the party seeking leave must have been the "losing" party in the Court of Appeals, listing instead such grounds as the significance of the issue involved to the state's jurisprudence. The application here, then, is not governed by Rule 7.203(A) but by Rules 7.301(A) and 7.302, and it is not necessary for the party seeking leave to demonstrate that he or she is "aggrieved" by the Court of Appeals decision in the sense of having had the judgment affirmed, if the party was the appellant in the Court of Appeals, or reversed, if the party was the appellee in the Court of Appeals.

Nonetheless, the People were and are aggrieved by the decision of the Court of Appeals, even though that court did not overturn the judgment below. In affirming on the ground of harmless error while holding that a trial judge may not instruct on criminal sexual conduct in the third degree of this type as an included offense to a charge of criminal sexual conduct in the first degree,[10] the Court of Appeals, for all practical purposes, said to the People "the judgment is affirmed, but you may not do this in the future—you are prohibited in these circumstances from seeking and gaining an instruction on criminal sexual conduct in the third degree of this sort as an included offense where criminal sexual conduct in the first degree is charged." This prohibition on future conduct by the People (and the trial court) came from *this* case—almost in the nature of an injunction—and the People are aggrieved by the Court of Appeals' opinion.

Virtually all decisions concerning the definition of an "aggrieved party" concern the *initial* seeking of review from a decision of the "initial" or trial court, not the seeking of discretionary review from the ultimate appellate court. But even these decisions do not simply define an "aggrieved party" as the party who "lost" in the trial court. Rather, common are such statements as an aggrieved party is a party "whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order.... It is a party who has an interest in the subject matter of the litigation,"[11] or an "aggrieved party" is one who has "an interest in the subject matter of the litigation."[12] And some cases have observed that "the definition of 'aggrieved party'

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[10] *People v Apgar*, 264 Mich App 321, 327 (2005).

[11] *Rymal v. Baergen* 262 Mich App 274, 319 (2004); and see *Maxwell v. Dept. of Environmental Quality,* 264 Mich App 567, 571 (2004).

[12] *In re Critchell Estate*, 361 Mich. 432 (1960); *Hartford v. Daniels* 70 Mich App 100, 105 (1976).

varies according to the type of case at issue."[13] For the reasons stated, the People fall within these formulations in this case.[14]

B. Criminal Sexual Conduct Is An "Offense Consisting of Different Degrees," and Criminal Sexual Conduct in the Third Degree Is A "Degree of That Offense Inferior to" Criminal Sexual Conduct In The First Degree

(1) The Opinion of the Court of Appeals

(a) The Pertinent Facts

Defendant here was charged with two counts of CSC 1 to encompass two theories of the commission of the crime (much like charging a first-degree murder in two counts for one death to charge theories both of premeditation and during the perpetration of an enumerated offense). One theory charged was that the defendant was armed with a weapon or an object that the victim believed to be a weapon, and the other was that the defendant was aided or abetted by one or more other persons and used force or coercion to accomplish the sexual penetration. Because of concerns after this court's decision in *People v Cornell*,[15] the prosecutor sought to resolve the issue of included offenses before trial began, indicating that he would be "asking for a lesser included of criminal

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[13] *Hartford v Daniels*, at 105.

[14] It may be that though MCR 7.203 is inapplicable here, applying only to the Court of Appeals, and though also this court has full authority under the Michigan Constitution to determine its own appellate jurisdiction, some members of the court may be concerned that an opinion in this case might be outside the judicial power as constituting an advisory opinion if the judgment in the case is not at issue. As it appears that currently a majority of the members of the court do not believe that the specific advisory opinion authority of the court contained in Const. 1963, art. 3, § 8 restricts the court in other circumstances, the People will make no further comment on this point. Compare the opinions of Justice Young and Justice Markman on the point in *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 472 Mich 1225 (2005).

[15] *People v. Cornell,* 466 Mich. 335 (2002).

sexual conduct in the third degree under count two for each defendant, if I can say it that way, as to her age," in addition to asking for criminal sexual conduct in the third degree as an included offense simply on the basis of the absence of charged aggravating circumstances (the weapon, and aiding and abetted by others).[16] The trial judge agreed that the latter charge of criminal sexual conduct in the third degree was appropriate, and as to the former said to counsel "you're aware of that" to which counsel answered not only "we are," but "no objection."[17] Mindful of not committing error under *Cornell*, the prosecutor asked as a "technical" matter to amend the information to add a count on the theory based on age.[18] Defense counsel made no objection, but the trial judge ruled "I am not amending any information...the lessers is something different, you know. But I'm not amending anything."[19] The case proceeded, then, on the prosecutor's understanding that the theory would be instructed on as an included offense (without objection), but the information would not be amended.[20]

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[16] I, 182.

[17] I, 184.

[18] I, 184.

[19] I, 185-186.

[20] And the People would contend that the objection to the instruction coming after agreement to it before testimony was taken, counsel at *that* time having said "no objection" to the prosecutor's request for an instruction on criminal sexual conduct in the third degree on the theory of age of the victim, was too late. Having agreed to the instruction before testimony was taken, and having fair notice of the age of the victim from the beginning of the case, the claim that the instruction should not have been given should be viewed as waived. See *People v Carter,* 462 Mich 206 (2000).

When instructions were discussed near the conclusion of trial, however, defense counsel changed course, now objecting to a criminal sexual conduct in the third degree charge on the theory of age.[21] And the jury convicted defendant of criminal sexual conduct in the third degree.

(b) The Lead Opinion

Each member of the panel wrote an opinion in this case. The "lead" opinion, for want of a better term, made the following points:

- The *Cornell* Court concluded that, pursuant to M.C.L. § 768.32, instructions on cognate lesser offenses are impermissible because they do not provide a defendant with adequate notice that he might be charged with the lesser offense.[22]

- Neither of the charged counts of CSC I includes the element of the victim's age. Thus, it is possible to commit CSC I under M.C.L. § 750.520b(1)(d) or (1)(e) without committing the uncharged offense of CSC III, M.C.L. § 750.520d(1)(a).

- Accordingly, under *Cornell* CSC III, M.C.L. § 750.520d(1)(a), is not a necessarily included lesser offense of CSC I, M.C.L. § 750.520b(1)(d) or (1)(e).

- Although defendant was convicted of an uncharged crime, ... defendant was not deprived of due process because all the elements of the uncharged crime were proved at the preliminary examination and trial without objection, providing defendant adequate notice.[23]

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[21] 32-35A. This appears to have been a summary for the record of matters taken up in chambers, as the trial judge did not further rule, apparently having indicated in chambers that the instruction would be given nonetheless. For reasons not apparent on the record, only this theory of criminal sexual conduct in the third degree was given to the jury.

[22] *People v. Apgar*, 264 Mich App 321, 327 (2004).

[23] 264 Mich App At 327.

(c) The Concurring Opinion

The concurring opinion, while agreeing with the lead opinion, stated:

- I write separately to say that the Supreme Court should reevaluate its decision in *People v. Cornell*....[24]

- The facts in *Cornell* did not address a lesser degree of the same offense. This is why the facts of this case are distinguishable from *Cornell*....While *Cornell* did address cognate lesser offenses that were not degreed offenses, in my opinion it did not change the law that has been in existence since 1846....[I] conclude that the Supreme Court intended to leave in place the statute's plain, historic application to degreed offenses, just as the Legislature originally intended.[25]

(d) The Concurring/Dissenting Opinion

The concurring/dissenting opinion agreed with the lead opinion regarding the application of *Cornell* to "degreed" offenses—to use the term employed in the concurring opinion—but disagreed on the notice holding, and would have found reversible error.[26]

(2) The Task Of Statutory Construction At Hand

Michigan's statement of the task of the judiciary in statutory construction is orthodox:

- Our primary aim is to effect the intent of the Legislature.

- We first examine the language of the statute and if it is clear and unambiguous, we assume that the

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[24] 264 Mich App At 331.

[25] 264 Mich App At 332.

[26] 264 Mich App At 333.

Legislature intended its plain meaning, and we enforce the statute as written." In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[27]

- *Only* where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[28]

This orthodox view, which has come to be known, sometimes derisively, as "textualism," has come under some attack, though in some of the expressed disagreement there appears to be more than a whiff of the semantic.

The principal disagreement between textualists and their critics is a fundamental one: when a court undertakes to "effect the intent of the legislature" what is it the court is attempting to

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[27] Helpfully, Michigan has statutes on the point: MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

[28] See e.g. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60, 631 N.W.2d 686 (2001); *People v. Phillips,* 469 Mich. 390, 666 N.W.2d 657 (2003); *Gilbert v. Second Injury Fund,* 463 Mich. 866, 616 N.W.2d 161 (2000); *People v. Davis,* 468 Mich. 77, 658 N.W.2d 800 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 465 Mich. 872, 633 N.W.2d 824 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich 966 (2003).

discover? Judge Easterbrook has written that "intent is empty."[29] By this he means not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective *subjective* legislative intent: "Peer inside the heads of legislators and you find a hodgepodge....Intent is elusive for a natural person, fictive for a collective body."[30] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one first to the principal expression of intent—the text of the statute. The "law" is what the "objective indication of the words" of the statute, in their context, including that of the statutory scheme, mean.[31] And when necessary to the task—but only then—aids to construction may be employed, such as established canons of construction, and even legislative history, where it exists, and where it is helpful (and it often is not).

Textualism, then, is not "strict constructionism," "a degraded form of textualism that brings the whole philosophy into disrepute."[32] And Judge Easterbrook, a textualist, has remarked that "'[p]lain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'" it must be imputed...."[33] But note the limitation of "interesting cases," which is to say that the meaning of a text, though often readily ascertainable from the meaning of the words understood

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[29] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Harv Jrnl L & Pub Policy 62, 68 (1994).

[30] Id.

[31] Antonin Scalia, *A Matter of Interpretation*, at 29.

[32] Id, at 23.

[33] Easterbrook, at 67.

in their ordinary sense, on occasion is ambiguous or, given the statutory scheme in which the text is placed, unclear. So long as the court in its attempt to discover the "objectified" intent of the legislature does so by seeking to determine "what a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*,"[34] its opportunity for supplanting the law as enacted with law of its own choosing is limited.

Returning, then, to the principles of statutory construction as oft-stated by this court, they may be rephrased as follows:

- Our primary aim is to effect the intent of the Legislature as that intent was objectified by the legislature in a written text.

- We first examine the language of the statute and if a reasonable person would gather a particular meaning from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, we enforce that understanding; if the statute employs technical words and phrases, or words that may have acquired a peculiar and appropriate meaning in the law, those shall be construed and understood according to that meaning.

- Where a reasonable person could gather multiple meanings from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, then other objective indicators of understanding are employed to the extent they are helpful, such as legislative history.

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[34] Scalia, at 17. And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

(3) Application to MCL 768.32

This is a case where an examination of the language of the statutory text, as its terms commonly would be understood, reveals a meaning that is clear and unambiguous. As Justice Holmes once said, the judicial function in this circumstance "is merely academic to begin with, to read English intelligently...."[35]

MCL 768.32(1) provides that:

> ...upon an indictment/(information) for *an offense, consisting of different degrees*, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of *that* offense *inferior to that charged* in the indictment/(information), or of an attempt to commit that offense[36]

(a) The Text

In examining the application of the statute to the crime of criminal sexual conduct (and other such offenses that are divided into degrees; see, for example, home invasion) the text is clear and unambiguous. If 1)an offense is charged, which 2) the offenses consists of different degrees, and 3)another offense is a "degree of *that* offense, which is 4)inferior to the offense charged, then 5)it

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[35] *Northern Securities Co. v. United States*, 193 US 197, 400- 401, 24 S Ct 436, 468, 48 L Ed 679 (1904)(Holmes, J.). See also *Hoste v. Shanty Creek Management, Inc.*, 459 Mich 561, 574(1999); *Western Mich. Univ. Bd. of Control v. Michigan,* 455 Mich 531, 539 (1997).

[36] The statute is not only venerable, dating back almost a century and a half, but common in this country. See e.g. West's Annotated Mississippi Code § 99-19-5 (and its predecessor, § 22 Hutchinson's Code of 1848, which more closely tracked MCL 768.32); Rev.Stat. of N.Y., part IV, ch. I, tit. VII, § 27 (1829); § 556.220, RSMo 1969 (Missouri); § 41--13--1, N.M.S.A.1953 (2d Repl.Vol. 6)(New Mexico); § 14, p. 513, 1 Wagner's Statutes (Nevada).

is not inappropriate by being contrary to law for an instruction to be given on that offense.[37] It is not difficult to discern whether criminal sexual conduct is an offense that "consists of different degrees," for the legislature has formally divided the offense of criminal sexual conduct into four different degrees and enumerated them as "degrees." The highest or most severe degree of criminal sexual conduct is first-degree criminal sexual conduct, and the degrees following are inferior to criminal sexual conduct in the first-degree, and each following degree is inferior to the one which precedes it. On an examination of the text the statute unambiguously provides, with regard to what Judge O'Connell here called "degreed offenses," that consideration of inferior or lesser degrees of a "degreed" offense is allowed. The inquiry may end here. But going on to context and history, is there anything in either the context of the statute in the statutory scheme, or its history, that would demonstrate that it does not mean what it so clearly says?

(b) Context and History

Construing the statute in 1869, Justice Christiancy for the Court observed that "[t]he general rule at common law was, that when an indictment charged an offense which included within it another less offense *or* one of a *lower degree*, the defendant, though acquitted of the higher offense, might be convicted of the less,"[38] subject to a discarded limitation on lesser offenses that were misdemeanors. The use of the disjunctive in the common-law rule is suggestive; that is, Justice Christiancy referred to offenses "included within" the charged offense *or* offenses "of a lower degree" than the charged offense, suggesting that the two are not necessarily identical. This court in *Hanna* was not concerned

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[38] *Hanna v People*, 19 Mich 316, 318 (1869) (emphasis supplied).

with offenses formally divided into degrees, but was required to determine whether the statute was limited to these offenses, and determined not:

> I do not think this provision was intended to be restricted in its application to offenses divided by the statutes contained in this title (which included all the provisions in reference to crimes), into classes *expressly designated* by the name of "degrees."[39]

The court reached this conclusion in that if the statute were to be *confined* to offenses expressly or formally divided into degrees, then its application would have been limited to the offense of murder, as it was the only offense then divided into degrees by the legislature.[40] So confined, the statute, in the context of both history and the statutory scheme, would have been entirely superfluous. This was so because the common law already provided for consideration of second-degree murder in an appropriate case;[41] moreover, as to murder, consideration of second-degree murder was *covered by a separate statute.* If it was not plain from the text of the statute and history, said Justice Christiancy, that the statute covered more than only murder, then the legislature had "put this view in the clearest possible light; by expressly providing in the next section (*Sec.3 Ch. 153, Rev. Stat. Of* 1846), after dividing murder into degrees, for a conviction of murder in the second degree upon a charge of murder in the first...."[42] The court's reference to "*Sec.3 Ch. 153, Rev. Stat. Of* 1846" is a reference to what is today MCL 750.318, providing, in pertinent part, that "[t]he jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain

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[39] 19 Mich at 320 (emphasis supplied).

[40] 19 Mich at 320.

[41] 19 Mich at 320.

[42] 19 Mich at 320-321.

in their verdict, whether it be murder of the first or second degree." Thus, continued the court, if MCL 750.32[43] "is not to be applied to any offenses not divided into degrees *eo nomine*, then it can have no application or effect whatever, and must have been inserted in the statute for no purpose or object. Such a construction is inadmissible, if the provision will admit of any other."[44]

The whole point of *Hanna*, then, is that the statute is not *limited* to statutes formally or expressly divided into degrees. It certainly *includes* murder, then the only offense divided into degrees, but is not "restricted" to it. The history of the section, and its context "placed alongside the remainder of the *corpus juris*,"[45] demonstrates, then, that it applies *both* to offenses formally divided

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[43] Then Comp. L. Sec. 5,952, of the Revised Statutes of 1846.

[44] 19 Mich at 321.

[45] Scalia, supra.

into degrees,[46] *and* to those offenses that are included within the charged offense by being a "part" of it in the sense of consisting of a subset of its elements.[47]

The court should now, the People submit, recognize that *Cornell* is a tool of construction for those many situations where the legislature has ~~not *expressly*~~ or *formally* divided an offense into degrees; where it *has*, no construction is necessary. When the legislature *has* formally divided an offense into degrees, as it now has with criminal sexual conduct, home invasion, and the like, then by legislative definition the offense is one "consisting of different degrees" and the *Cornell* test is unnecessary. For an offense such as criminal sexual conduct, the offense is criminal sexual conduct, and it is formally divided into degrees by the legislature, which has expressly denominated the

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[46] *Hanna*'s operating assumption—that the statute *applied* to murder, the only offense then divided into degrees by the legislature, the question being whether it was *restricted* only to murder—demonstrates that the "subset" analysis is unnecessary to the identification of included offenses which are expressly made "inferior degrees" by the legislature, not only because of the unambiguous text ("an offense consisting of different degrees"), but history. At that time, it must be remembered, second-degree murder contained an element *not* required for first-degree murder when the theory of murder was that it was committed during the course of an enumerated crime. At the time, a showing of malice was *not* necessary to first-degree murder on this theory—it was not until *People v Aaron*, 409 Mich 672 (1980) amended the statute by striking one definition of murder at the common law (a death during the course of any felony; the common-law definition(s) of murder having been enacted by the legislature by use of the term without alteration, cf. *People v Riddle*, 467 Mich 116 (2002)) that proof of malice became necessary for conviction of first-degree "felony" murder. Thus, at the time, when the theory of first-degree murder charged was "felony-murder," second-degree murder was considered within this statute though it contained an element *not* present in the first-degree murder charged. See also *State v Wilkerson*, 616 SW2d 829, 833 (Mo, 1981), finding second-degree murder an "inferior degree" of first-degree murder, including "felony murder," under a statute identical to MCL 768.32, on the ground that the legislature had "specifically denominated" it so. But see *State v Wade*, 490 SE2d 724, (1997), finding second-degree murder not a lesser-included offense of felony-murder because not a subset of its elements where malice not required for felony-murder, *but* with no statutory counterpart to MCL 768.32 concerning offenses consisting of different degrees and "inferior" degrees.

[47] This the holding of *Cornell*, to which the People fully subscribe, and will not reargue here.

degrees of the offense in descending order (1st, 2nd, 3rd, and 4th), with the *Cornell* test applicable to other situations where offenses may be subsets of these offenses though not formally denominated as lesser degrees.[48] Thus, CSC 3 is an included offense of CSC 1 without regard to whether it meets the subset of elements test, because the legislature has formally divided the offense of criminal sexual conduct into degrees.

C. Conclusion

Criminal sexual conduct is an offense divided into degrees. Criminal sexual conduct in the second, third, and fourth degrees are "inferior" to criminal sexual conduct in the first degree; criminal sexual conduct in the third and fourth degrees are inferior to criminal sexual conduct in the second degree, and criminal sexual conduct in the fourth degree is inferior to criminal sexual conduct in the third degree. Though it likely will never be the case that as a matter of fact an instruction on a penetration offense (criminal sexual conduct in the third degree) will be appropriate when the charge is contact (criminal sexual conduct in the second degree), this is simply because the factual contest will always be the other way around (i.e., that a contact occurred rather than a penetration), and not because criminal sexual conduct in the third degree is not an inferior degree of criminal sexual conduct to criminal sexual conduct in the second degree.

Judge O'Connell's call in this case for a "reevaluation" by this court of *Cornell* is unnecessary, for he is correct that the issue involved here was not before this court in *Cornell*, and further correct that the statute expressly covers as "inferior" offenses those offenses that are an

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[48] See e.g. *People v Nickens*, 470 Mich 622 (2004).

"inferior degree" of what Judge O'Connell calls a "degreed offense."[49] The Court of Appeals thus here reached the correct result—affirmance—albeit for the wrong reason.

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[49] "The facts in *Cornell* did not address a lesser degree of the same offense. This is why the facts of this case are distinguishable from *Cornell*....While *Cornell* did address cognate lesser offenses that were not degreed offenses, in my opinion it did not change the law that has been in existence since 1846....[I] conclude that the Supreme Court intended to leave in place the statute's plain, historic application to degreed offenses, just as the Legislature originally intended." 264 Mich App At 332.

Relief

Wherefore, the People respectfully request this Honorable Court affirm the Court of Appeals, but by finding no error, rather than error that is harmless.

Respectfully submitted,

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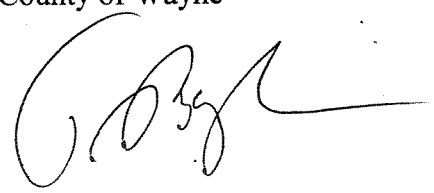

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